FILED
MAY 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1513

In The

Supreme Court of the United States

October Term 1989

MAGNUM TOWING, INC. and
RENALDO HERNANDEZ,

Petitioners,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the
Metro-Dade Police Department, and
DOLLAR ENTERPRISES, INC. d/b/a
Dade Wrecker Service,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

ROBERT M. JASINSKI
Counsel of Record
The Roney Plaza, Suite M-8
2301 Collins Avenue
Miami Beach, FL 33139
Telephone: (305) 538-4421

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT

I. THE TRIAL COURT NEVER REACHED THE IMMUNITY ISSUES RAISED BY THE RESPONDENTS IN THEIR BRIEF 1

II. THE IMPOUNDMENT OF A VEHICLE PURSUANT TO THE COMMUNITY CARETAKING FUNCTION OF THE POLICE IMPLICATES THE FOURTH AMENDMENT.. 5

III. RESPONDENTS' CONDUCT VIOLATED CLEARLY ESTABLISHED LAW..... 6

IV. THE RESPONDENTS VIOLATED THE PETITIONERS' RIGHT TO DUE PROCESS..... 9

SUMMARY..... 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Addante v. Village of Elmwood Park, 541 F. Supp. 497 (N.D. Ill. 1982) 4

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1976)..... 5

Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983) 9

Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982) 4

Colorado v. Bertine, 479 U.S. 367 (1987) 5, 6, 7, 8

Crane v. State of Texas, 759 F.2d 412 (5th Cir. 1985) 2

Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978) 9

Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988) 9

Felder v. Casey, 487 U.S. 131 (1988)..... 3

Folsom Inv. Co. v. Moore, 681 F.2d 1032 (5th Cir. 1982)..... 9

Goichman v. Rheuban Motors, Inc., 82 F.2d 1320 (9th Cir. 1982) 4

Howerton v. Garcia, 708 F.2d 380 (9th Cir. 1982)..... 9

Jones v. Preuit & Mauldin, 851 F.2d 1321 (11th Cir. 1988) (en banc)..... 9

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)..... 2

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 4

Martinez v. California, 444 U.S. 277 (1980)..... 3

Messick v. Leavins, 811 F.2d 1439 (11th Cir. 1987) 5

Miller v. State, 403 So. 2d 1307 (Fla. 1981).....6, 7

TABLE OF AUTHORITIES – Continued

Page

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 2

People v. Krezen, 397 N.W.2d 803 (Mich. 1986) 5

Soffer v. City of Costa Mesa, 798 F.2d 361 (9th Cir. 1986) 4

State v. Perry, 324 S.E.2d 354 (W. Va. 1984) 5, 6

State v. Rice, 717 P.2d 695, 696 (Utah 1986) 5

State v. Smith, 529 So. 2d 1226 (Fla. 3d DCA 1988) 7

Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977) 4

Tower v. Glover, 467 U.S. 914 (1984) 5

United States v. Brown, 797 F.2d 929 (4th Cir. 1986) 6

United States v. Pappas, 735 F.2d 1232 (10th Cir. 1984) 6

Wells v. State, 539 So. 2d 464 (Fla.), *cert. granted*, 109 S.Ct. 3183 (1989) 7

CONSTITUTION, STATUTES, AND ORDINANCES

Fourth Amendment 6

Fourteenth Amendment 5

42 U.S.C. § 1983 ..... 2, 3, 4

Declaratory Judgment Act, § 86.011, Fla. Stat. (1989) 2

Section 715.07, Fla. Stat. (1987) 2

Dade County Code § 30-384 .....7, 8

No. 89-1513

In The

Supreme Court of the United States

October Term 1989

MAGNUM TOWING, INC. and
RENALDO HERNANDEZ,

Petitioners,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and
DOLLAR ENTERPRISES, INC. d/b/a
Dade Wrecker Service,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

ARGUMENT

I. THE TRIAL COURT NEVER REACHED THE IMMUNITY ISSUES RAISED BY THE RESPONDENTS IN THEIR BRIEF

The Respondents are incorrect in their assertion that "[a]s to Dade County, the case below was decided pursuant to state sovereign immunity – there is therefore no need to reach the federal issues raised by Petitioners." Resp. Brief in Opp. at 4.

In its order granting final summary judgment the trial court, in compliance with Florida's Declaratory Judgment Act, §§ 86.011, Fla. Stat. (1989), et seq., held that the "[d]efendants' actions did not violate the Fourth or the Fourteenth Amendments. . . ." Pet. Cert., Final Summary Judgment, Appendix B at App. 2. Having found that the Respondents violated no constitutional rights, statutes, or ordinances, the lower court logically concluded that the "Defendants have no liability to Plaintiffs under either 42 U.S.C. § 1983 or Section 715.07 of the Florida Statutes." *Id.* The Third District affirmed, without opinion, the judgment of the trial court. It is patently obvious that neither the trial nor the appellate court considered the immunity issues raised by the Respondents in their brief in opposition.

A. RESPONDENTS ARE NOT IMMUNE FROM SUIT BROUGHT IN STATE COURT UNDER 42 U.S.C. § 1983

(1) Dade County Is Subject To Suit In State Court In A § 1983 Action.

It should be noted from the onset that although the Eleventh Amendment precludes suits against a state in federal court, it has long been recognized that counties and local government entities do not occupy the same position as the state for purposes of the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 123 n. 34 (1984); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). A lengthy list of circuit decisions rejecting the applicability of the Eleventh Amendment to counties is found in *Crane*

v. State of Texas, 759 F.2d 412, 415-417 (5th Cir. 1985).[1]

This Court has made it clear that the state immunity doctrines do not limit liability in § 1983 actions brought in state courts. In *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980), this Court held that:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . .

The same policy is applicable to § 1983 actions filed in state court. *Accord Felder v. Casey*, 487 U.S. 131, 139 (1988) ("[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is pre-empted, even where the federal civil rights litigation takes place in State Court, because the application of the state immunity law would thwart the congressional remedy, . . . which of course already provides certain immunities for state officials.").

---

[1] Dade County cites several cases in its Brief at 2 in support of its argument that it is immune from suit brought under § 1983 in state court. *See, e.g., Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987). The cases cited say no more than what this Court recently held in *Will v. Michigan Department of State Police*, 491 U.S. ___, 109 S.Ct. 2304 (1989), that neither a state nor its agencies is a person under § 1983. *Will*, at ___ n. 3, 109 S.Ct., at 2306 n.3.

(2) Del Mazo And Dollar Violated Clearly Established Fourth And Fourteenth Amendment Rights When They Caused The Plaintiffs' Tow Truck To Be Removed From Private Property.

An officer who directs the towing of a vehicle pursuant to an ordinance that does not provide for a prompt postdeprivation hearing, as well as a towing company that acts under his direction and control, can be held accountable in a § 1983 action for violating procedural due process rights. *Soffer v. City of Costa Mesa*, 798 F.2d 361, 364 (9th Cir. 1986); *Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977) (county, officer, and tow company held liable for due process violation); *Goichman v. Rheuban Motors, Inc.*, 82 F.2d 1320, 1322 (9th Cir. 1982) (private towing company acting at behest of police officer in pursuance of statutory scheme acted under color of state law). In *Addante v. Village of Elmwood Park*, 541 F. Supp. 497, 498 (N.D. Ill. 1982) the court held that the towing company, as well as its supervisor, could be held liable under § 1983 for towing vehicles when the local government failed to provide a meaningful postdeprivation hearing. The " . . . question is not who is best equipped to remedy the violation but rather who caused the violation." Intertwined responsibility and activity is what makes private persons "state actors." *Id.* at 499 n. 5. Even a murderer on death row was successful in his suit against a sheriff and wrecker for violating his right to procedural due process. *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) (tow company liable for jointly participating in seizure of truck). *See also Lugar v. Edmondson Oil Co.*, 457 U.S 922, 941 (1982), ("a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment.").

Finally, the Respondents had entered into a contract whereby DOLLAR would tow and impound vehicles at the request of the police thereby rendering it liable pursuant to a "conspiracy theory of liability" (accomplish purpose by unlawful means). DOLLAR is liable for DADE's acts "[b]ecause 'an otherwise private person acts "under color of" state law when engaged in a conspiracy with state officials to deprive another of federal rights. . . .' " *Tower v. Glover*, 467 U.S. 914, 920, 104 S.Ct. 2820, 2824, 81 L.Ed.2d 758 (1984); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1976); *Messick v. Leavins*, 811 F.2d 1439, 1443 (11th Cir. 1987) (due process violation).

II. THE IMPOUNDMENT OF A VEHICLE PURSUANT TO THE COMMUNITY CARETAKING FUNCTION OF THE POLICE IMPLICATES THE FOURTH AMENDMENT

Despite the Respondents' contention to the contrary, Resp. Brief at 5, the decision in this case is contrary to this Court's decision in *Colorado v. Bertine*, 479 U.S. 367 (1987) as well as the universally recognized principle that "[a]bsent a statutory basis justifying impoundment, we look to the totality of the surrounding circumstances to determine the reasonableness of the seizure of the vehicle." *State v. Rice*, 717 P.2d 695, 696 (Utah 1986). *See State v. Perry*, 324 S.E.2d 354, 359 (W. Va. 1984) (collecting cases); *cf. People v. Krezen*, 397 N.W.2d 803, 805 (Mich. 1986) (while noting that there may well be situations in which the impoundment would violate the Fourth Amendment as an unreasonable seizure, the court upheld impoundment, which occurred within the context of a standard departmental policy that, upon arrest of the driver, all vehicles not released to another driver were to be impounded). However,

> in the situation where the owner or possessor of a vehicle has been arrested in or near his car, ordinarily, he must be given a reasonable opportunity to make some alternative disposition of the vehicle before the police may impound it for the sole purpose of protecting it and its contents from theft or damage.

State v. Perry, 324 S.E.2d 354, 359 (W. Va. 1984); *Miller v. State*, 403 So. 2d 1307 (Fla. 1981). *See also United States v. Pappas*, 735 F.2d 1232 (10th Cir. 1984) (impoundment unreasonable in light of the circumstances without first affording operator reasonable opportunity to make alternative arrangements); *United States v. Brown*, 797 F.2d 929, 932 (4th Cir. 1986) (question is whether the police officer's decision to impound was reasonable under the circumstances).

The validity of an impoundment rests on whether the police officer has reasonable cause to impound the vehicle. In this case the arresting officer did not have reasonable cause to impound the Petitioners' tow truck.

III. RESPONDENTS' CONDUCT VIOLATED CLEARLY ESTABLISHED LAW

In order to put this case in its proper perspective one should look at the chronology of the recent decisions addressing the impoundment issue. Prior to this Court's decision in *Bertine* the law was clearly established in Florida, as well as in most other states, that prior to impoundment a reasonable opportunity to provide for alternative arrangements must be afforded to the vehicle operator in order to comply with the reasonableness requirement of the Fourth Amendment. *Miller v. State*, 403 So. 2d 1307 (Fla. 1981). On January 14, 1987 this Court published its opinion in *Bertine* in which the Court held that the Fourth Amendment did not mandate that an

alternative to impoundment must be afforded when police are following standardized procedures. The Petitioners' vehicle was impounded on March 10, 1987, approximately 2 months later. Subsequently, the Third District Court of Appeal on August 8, 1988, in *State v. Smith*, 529 So. 2d 1226 (Fla. 3d DCA 1988), held that the police acted reasonably when they inventoried a rental vehicle without affording the operator any opportunity to provide for its removal. Since the operator was not an authorized driver he was not offered any opportunity to make arrangement for its removal. The **standard procedures** applicable to **rental vehicles** was that the rental car company would be notified to come and get the vehicle. An inventory would be conducted prior to their arrival. The Third District's statement "that *Bertine* obviates the *Miller* requirement that an arrested driver be offered an alternative to impoundment . . . ," *Smith*, at 1231, was dicta – there was no impoundment in *Smith*. Finally, in *Wells v. State*, 539 So. 2d 464 (Fla.), *cert. granted*, 109 S.Ct. 3183 (1989), the Supreme Court of Florida acknowledged that its prior decision in *Miller v. State* was "superseded" by *Bertine* "to the extent of any inconsistency." *Wells*, at 469.

> Under the analysis of *Bertine*, we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in *Miller* and *Sanders*. Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousands dollars in cash rather than leave it unprotected at the roadside.

Id.

The Third District, in *State v. Smith, supra*, went on to opine that Dade County Code § 30-384's requirement that the vehicle operator must be afforded a reasonable opportunity in light of the circumstances to make alternative

arrangements prior to an impoundment was no longer applicable following this Court's decision in *Bertine*. However, the Respondents are hardly in any position to claim that they relied on a decision handed down 17 months subsequent to the incident in question to justify their actions. Regardless, the Third District panel's conclusion that *Bertine* wiped out the need for police to comply with standardized procedures applicable to the impoundment of vehicles was obviously wrong.

Assuming, arguendo, that Dade County Code § 30-384 is no longer applicable the Respondents are in no better position. The decision in *Bertine* did nothing to upset the clearly established law that police, in the absence of any standardized procedures, must afford the vehicle operator a reasonable opportunity, in light of the circumstances, to make alternative arrangements for the removal of the vehicle. *Bertine* made it clear that if standardized procedures exist the police must abide by them. DEL MAZO failed to follow standardized procedures. He also failed to act reasonably. His actions violated clearly established law. He is not entitled to "qualified immunity."

DOLLAR should have been aware that DEL MAZO did not have any right to seize and impound the tow truck. Since it was acting in concert with DEL MAZO it is liable to the same extent as DEL MAZO. It cannot claim that it is entitled to "qualified immunity."

Dade County is not being sued for any Fourth Amendment violation. It is being sued for establishing the policy [Dade County Code § 30-384] which permitted the impoundment, without providing for adequate procedural safeguards.

DOLLAR has raised an interesting issue concerning the applicability of "qualified immunity" to private individuals acting under color of state law. There exists a split among the circuits. The Fifth, Eighth, and Eleventh Circuits permit private parties to raise the defense of "qualified immunity." *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982); *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983; *Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988) (en banc), vacated on other grounds, 109 S.Ct. 1105 (1989). The First, Sixth, and Ninth Circuits have refused to allow private parties to raise the immunity defense. *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), *cert. denied* 439 U.S. 910 (1978) (private parties could not rely on qualified immunity defense because no policy reasons justified this); *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) (court joins the First and Ninth Circuits in rejecting immunity for private parties); *Howerton v. Garcia*, 708 F.2d 380 (9th Cir. 1982). This issue has yet to be addressed by this Court.

IV. THE RESPONDENTS VIOLATED THE PETITIONERS' RIGHT TO DUE PROCESS

Respondents argue that "there was not a true 'deprivation' of the tow truck to begin with," Resp. Brief at 6, arguing that the Petitioners "refused, to have their vehicle released. . . ." *Id.* at 7. This is incorrect. HERNANDEZ refused to sign the release form due to the fact that he felt that it would be far more reasonable to notify MAGNUM that he was arrested and that someone should be dispatched to retrieve the vehicle rather than leave it unattended at the scene of the arrest. Dade County Code § 30-384 required that DEL MAZO offer this opportunity to the Respondents. HERNANDEZ's insistence that the

officer follow the law cannot be labeled unreasonable, nor can it be construed as a waiver of any rights.

When owner/manager Lopez arrived on the scene, prior to the removal of the tow truck, he requested that the vehicle be released. The Respondents refused to release the vehicle – even after he offered to pay to have it released. See Lopez Affidavit, Pet. App. F. Contrary to the Respondents' assertion, there was no voluntary relinquishment of possession of the tow truck.

SUMMARY

The decision handed down in this case is in conflict with the decisions of this Court as well as numerous federal appellate and state supreme court decisions. The issues presented in this case concern fundamental constitutional rights.

Certiorari is appropriate in this case in order to remove the conflicts that this case has created and permit the Petitioners to seek redress for the constitutional violations perpetrated by the Respondents. This case presents important questions of federal law which have not been, but should be, settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. JASINSKI
Attorney for Petitioners
The Roney Plaza, Suite M-8
2301 Collins Avenue,
Miami Beach, Florida 33139
Telephone: (305) 538-4421

May 15, 1990.